

Double levy of tax on a single transaction – Yes or No!!

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Article discusses issues relating to section 142(11)(c) – Transition Provision relating to a transaction where both VAT & Service Tax has been paid.

Before we set out to interpret section 142(11)(c), the rules of interpretation on the basis of which we have interpreted section 142(11)(c) is listed below for the reference of the discerning reader:

1. *Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare Vel respondere* - To interpret and in such a way as to harmonize law with laws, is the best mode of interpretation.
 - i. The rule of interpretation is relied upon to harmonise
 1. the applicability and
 2. the areas of operationof the three sub clauses of section 142(11).
 - ii. Section 142(11)(a) applies to a transaction which is liable to VAT while section 142(11)(b) applies to a transaction liable to Service Tax. If that be so, what would be the areas of operation of section 142(11)(c) would the question which would be topmost on the reader's mind.
 - iii. The above rule of interpretation is relied upon to so interpret clauses (a), (b) and (c) of section 142(11) such that each of the sub clauses of section 142(11) is given its due play and area of operation.
 - iv. The above rule of interpretation is relied upon to interpret section 142(11)(a),(b) and (c) such that none of the clauses are rendered otiose.
 - v. The above rule of interpretation is relied upon to determine jurisdiction and areas of operation of clauses (a) and (b) vis-à-vis clause (c) such that the provisions do not override or run into conflict with one another.
2. *Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare Vel respondere* - It is unjust to decide or respond as to any particular part of a law without examining the whole of law.
 - i. This rule of interpretation is relied upon to interpret clause (c) in the schema of section 142(11).
 - ii. Section 142(11)(c) would have to be interpreted in light of and along with section 142(11)(a)&(b) and not independently.
3. *Ex praecedentibus et consequentibus optima fit interpretation* – The best interpretation is made from the context.
 - i. Sub clauses of section 142 must be interpreted in the context of 'area of operation' and in terms of 'time lines' of erstwhile laws and GST.
 - ii. Interpreting in the context of transition means giving due effect to the charge and assessment provisions under the erstwhile laws and under GST law.

- iii. The law ought to read in such a manner that it does not over-ride a charge under the erstwhile law while at the same time protecting the levy under GST law.
- iv. Interpreting in the context of transition means that no transaction should be exigible to double taxation nor must any part of the transaction get excluded from charge, which was otherwise chargeable under the erstwhile laws and GST law.

Having set the ground rules, we now proceed to interpret section 142(11)(c). It is imperative to understand the scope and ambit of section 142(11)(a)&(b), so that we can determine the jurisdiction of section 142(11)(c). Section 142(11)(a)&(b) both start with non-obstante clause. Section 142(11)(a) over-rides section 12 of GST law while section 142(11)(b) over-rides section 13 of the GST law. Readers would be aware that section 12 and section 13 deals with time of supply of goods and services respectively.

Section 12(1) and section 13(1) state that liability to pay tax on goods and services respectively arise at the time of supply as determined by provisions of section 12 and 13. Since section 142(11)(a)&(b) over-ride section 12 and 13 respectively. The provisions of section 142(11)(a)&(b) would therefore hold fort as regards leviability or non-leviability of GST for transactions subject to section 142(11). As per section 142(11)(a)&(b), GST shall not be 'payable' on goods or services respectively to the extent tax was 'leviable' under VAT/ Finance Act, 94 respectively. The Apex Court in Assistant Collector of Central Excise V. National Tobacco Co of India Ltd, 1978 (2) ELT J416 (SC) held that levy is of a wide importance and that it includes both imposition of tax and assessment of tax. Thus if any transaction is liable to VAT/ Finance Act, 1994, the said transaction cannot be assessed and collected to tax under GST.

It is with this understanding that we proceed to interpret section 142(11)(c). The relevant provision is extracted herein below for ready reference of the reader:

where tax was paid on any supply both under the Value Added Tax Act and under Chapter V of the Finance Act, 1994 (32 of 1994), tax shall be leviable under this Act and the taxable person shall be entitled to take credit of value added tax or service tax paid under the existing law to the extent of supplies made after the appointed day and such credit shall be calculated in such manner as may be prescribed

Section 142(11)(c) starts with the words, 'where tax was paid on any supply both under VAT and FA, 94'. For tax to be payable, there must first exist a levy, then and then only the amount paid would be clothed with the nature of 'tax', else not. Reliance is placed on Article 366(28) of the Constitution, which defines 'taxation' as including any 'imposition' of tax, whether general or special and further states that 'tax' shall be constructed accordingly. Reliance is also placed on Article 265 of the Constitution which states that 'No tax shall be levied except by authority of law'. Hence for section 142(11)(c) to apply, first there must have been an imposition of tax. For imposition of tax, there must be a levy, as per National Tobacco Company case. A transaction which is purely in the nature of sale of goods would be subject matter of section 142(11)(a) while a transaction which is purely in the nature of service would be subject matter of section 142(11)(b). However, what would the tax treatment for transition purposes in case of a composite transaction which is liable to both VAT and Service Tax was the subject matter of discussion of the study group.

The study group examined two interpretations which are both presented here along with the arguments to support each for reader's consideration.

An Interpretation

The material portion of the composite transaction would get covered under section 142(11)(a) and the service portion of the composite transaction would get covered under section 142(11)(b). And support was found in these grounds:

The secure premise on the basis of which the aforesaid interpretation is made lies in the wordings employed by section 142(11)(a)&(b), which use the term 'leviable on the said goods/ services' respectively. Since material portion and service portion of composite transaction are leviable to VAT and Service Tax respectively, hence the first line of interpretation is that section 142(11)(a)&(b) themselves inter-se cover the entire canvas of transactions leviable to VAT and/or Service tax. If that be the case, what is the purpose, scope and ambit of section 142(11)(c) would be the topmost question in the reader's mind. The first line of interpretation, is that section 142(11)(c) applies only to a case where:

- i. VAT and Service Tax though not payable was yet paid voluntarily by an assessee to gain tax arbitrage during transition.
- ii. The VAT and Service Tax so paid, though not leviable would fall within the scope of section 142(11)(c).
- iii. That section 142(11)(c) has been enacted as a safeguard against such astute and shrewd assesseees who pay VAT and Service Tax, though not 'leviable' to save themselves from anticipated increase in tax rate under GST regime.
- iv. That in a case where VAT and Service Tax was not 'leviable' but VAT and Service Tax has been paid would never get covered under section 142(11)(a)&(b) since 'leviability' to VAT/ Service Tax is a pre-condition for applicability of clauses (a) and (b). Such a transaction which does not fall under clauses (a) and (b) would fall under section 142(11)(c).

In the aforesaid case, VAT and Service Tax was paid, though it was not leviable under the respective acts. Since VAT and Service Tax was paid, though it was not leviable under the said Acts, the credit of taxes paid under the said Acts would be available under GST. In a case where GST is payable on a transaction on which VAT and Service Tax has been paid (though not payable under the respective erstwhile laws), section 142(11)(c) would apply and seeks to remedy the mischief by bringing the transaction to tax under GST, to the extent supply is made after the appointed date and provides VAT paid and Service Tax paid voluntarily as credit to be set off against GST to avoid double taxation of the same transaction both under the erstwhile laws of VAT, Service Tax and under the new law of GST. The aforesaid line of thought is fortified by Article 20(2) of the Constitution which prohibits double jeopardy, in addition to a catena of judicial decisions which have held that tax cannot be levied twice on the same aspect twice, unless expressly stated by the law. It would be pertinent at this juncture to rely on CCE V. Vazir Sultan Tobacco Co Ltd., 1996 (83) ELT 3 (SC). The Supreme Court in the said case was deciding about the leviability of Special Excise Duty on goods cleared/ removed after the imposition of Special Excise Duty but manufactured prior to bringing Special Excise Duty on the statute books. The Supreme Court laid down the following propositions in law in the aforesaid case:

- i. Once the levy is not there at the time when the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. The idea of collection at the stage of removal is devised for the sake of convenience.

- ii. Section 3 (Charging section of CEA, 44) cannot be read as shifting the levy from the stage of manufacture or production of goods to the stage of removal. The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal.
- iii. Special Excise Duty came into effect only on and from March 1, 1978 which means that the goods produced prior to that date were not subject to such levy. If that is so, the levy cannot attach nor can it be realised because such goods are removed on or after March 1, 1978

Though the ratio is laid down in the context of Central Excise duty, manufacture and removal, the concepts laid down therein would apply on all fours to the present case also. Applying the ratio of Vazir Sultan Tobacco Case to section 142(11), it can be stated that:

- i. GST came into effect only from 1.7.17, hence transactions on which both VAT and Service Tax was payable prior to 1.7.17 is liable to VAT and Service Tax on material and service portion respectively and cannot be leviable to GST.
- ii. If a transaction is leviable to both VAT and Service Tax prior to 1.7.17, the liability towards material portion gets covered under VAT and the liability toward service portion gets covered under Service Tax law.
- iii. As a natural consequence the material portion of composite transaction would get covered under section 142(11)(a) and service portion would get covered under section 142(11)(b).
- iv. In the same manner as levy cannot be shifted from 'manufacture' to 'removal', merely because excise duty was payable on removal, similarly mere payment of tax both under VAT and Service Tax on a composite transaction would not shift the liability of the transaction to VAT and Service Tax.
- v. For a transaction to be leviable to VAT/ Service Tax, the taxable event must have occurred or the point of taxation must have been triggered. If points of taxation under VAT and Service Tax is not triggered, it cannot be stated that the transaction is 'leviable' to VAT/ Service Tax, notwithstanding the fact that VAT and Service Tax has been paid on the same voluntarily by the assessee (presumably to claim tax arbitrage during the course of transition into GST).
- vi. Mere payment of both VAT and Service Tax by an assessee, though the taxable event has not occurred/ point of taxation has not been triggered would not make the transaction 'liable' to VAT/ Service Tax.
- vii. Hence, in such a case, where both VAT and Service Tax were not liable, the VAT and Service Tax paid is allowed to be taken as credit and set off against the GST liability under section 142(11)(c) to the extent the supply is made after the appointed date, since GST would get attracted on such a transaction.

This view needs to buttress against an alternative view that GST is leviable on composite transactions to the extent 'supply' is made after the appointed date as per section 142(11)(c), notwithstanding the fact that tax has already been remitted under the erstwhile VAT and Service Tax laws. And that VAT and Service Tax paid on such composite transactions under the erstwhile laws would be available as credit under section 142(11)(c), to the extent VAT and Service Tax has been paid under old laws, which is treated as 'Supply' under GST. An exception has been carved out in section 142(11) wrt composite transactions. While the normal rule under section 142(11)(a)&(b) is that a transaction 'leviable' to VAT/ Service Tax would not be leviable to GST, section 142(11)(c) carves out an exception to the said rule. Section 142(11)(c) states that with

respect to composite transactions which are leviable to both VAT and Service Tax, GST would be leviable to the extent 'Supply' is made after the appointed date. Since tax would become leviable both under the erstwhile VAT and Service Tax law on the one hand and GST on the other, VAT and Service Tax paid under the erstwhile laws would be allowed as credit to the extent such VAT and Service Tax paid relates to 'Supply' made after the appointed date. Such an interpretation flows from the text of section 142(11)(c). Support can be found in *Baidyanath Ayurveda Bhawan Pvt Ltd V. Excise Commissioner*, 1999 (110) ELT 363 (SC), where the Apex Court laid down the following rule of interpretation of statutes:

In a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. The Apex Court reiterated this principle of interpretation from *Cape Brandy Syndicate V. Commissioner of Inland Revenue*, (1921) 1KB 64.

Though beset with formidable legal challenges, though no devoid of fitting reply to those legal challenges (provided in italics):

Double Taxation – A transaction can be leviable either to VAT and Service Tax law (collectively called as 'erstwhile laws') or GST and not both. If tax paid under erstwhile laws is allowed as credit and made amenable to GST, then it would tantamount to double taxation, once under VAT and Service Tax law and secondly under GST.

- i. The legality or otherwise of double taxation has been dealt with the Honourable Supreme Court in the following cases amongst others.
- ii. The Apex Court in *Jain Brothers V. UOI*, (1970) 77 ITR 107 held that:
 1. It is not disputed that there can be double taxation if the legislature has distinctly enacted it.
 2. It is only when there are general words of taxation and they have to be interpreted, they cannot be so interpreted as to tax the subject twice over to the same tax (vide *Channell J. in Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*).
 3. The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of section 23(5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation.
 4. It is true that section 3 is the general charging section. Even if section 23(5) provides for the machinery for collection and recovery of the tax, once the legislature has, in clear terms, indicated that the income of the firm can be taxed in accordance with the Finance Act of 1956 as also the income in the hands of the partners, the distinction between a charging and a machinery section is of no consequence.
 5. Both the sections have to be read together and construed harmoniously.
 6. If any double taxation is involved the legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to invoke the general principles that the subject cannot be taxed twice over.
- iii. The Apex Court in *Hind Plastics V. Collector of Customs*, 1994 (71) ELT 325 (SC) held that double taxation may be harsh but it is not illegal.
- iv. The Apex Court in *Premier Tyres Ltd V. CCE*, 1987 (28) ELT 58 (SC) further held that 'there can be no double taxation in the levy of excise duty, but the court may lean in favour of construction which will avoid double taxation'

- v. The Delhi HC in *UOI V. Intercontinental Consultants & Technocrats Pvt Ltd.*, 2013 (29) STR 9 (Del) held that ‘there can be double taxation but it must be clearly provided for and intended. Double Taxation cannot be enforced by implication’
- vi. Section 142(11)(c) employs the words ‘where tax was paid on any supply both under VAT and Finance Act, 1994, tax shall be leviable under this Act’. Hence GST law has specifically stated that there shall be double taxation once under VAT and Service Tax law and secondly under GST law.
- vii. The second portion of section 142(11)(c), repairs the hardship caused by double taxation by way of granting credit of VAT and Service Tax paid.
- viii. Thus in law, though the impugned transaction is subject to tax twice, in reality the burden of tax is only once since credit is provided for VAT and Service Tax.

Mere grant of credit of VAT and Service Tax paid would not correct the illegality of double taxation.

- i. Double Taxation is not illegal. Courts would lean in favour of construction which will avoid double taxation.
- ii. The words used in section 142(11)(c) is ‘tax’ paid under VAT and Service Tax law would be allowed as credit to the extent they relate to ‘tax’ leviable under GST law.
- iii. Once the term ‘tax’ paid under VAT and Service Tax is used, it denotes levy and imposition under the said laws, if not the amount would not be eligible to be bracketed as ‘tax’ within the meaning of A.265 r/w A.366(28) of the Constitution of India.
- iv. The construction of section 142(11)(c) would provide sufficient elbow room for the Courts to hold that there is no double taxation in case of section 142(11)(c), since credit is granted of the erstwhile taxes paid.

Another Interpretation

The above interpretation was contrasted with another view that the study group valued so greatly that it made its way as a meritorious alternative for readers to consider.

Here, section 142(11)(c) is considered to be a provision that is put into place to ease the hardship of all composite transactions which are liable to both VAT and Service Tax law. The valuation mechanisms under VAT and Service Tax law are not mutually exclusive leading to double taxation in a few cases (software/ right to use) and increased taxation in other cases (110%, 140%, as the case may be in case of construction contracts). Works Contracts are liable to tax on advances under service tax law and VAT law in a few states. Thus VAT would be paid on advances in some states but remain unpaid in some states on advances. To bring in a solution for such diverse law, section 142 (11)(c) has been brought into statute which takes care of states and avoids tax arbitrage during transition into GST.

Transitional Provisions are guidelines which are to be followed to ensure that there is smooth transition from erstwhile laws to GST law. In the changeover to the new GST regime, a lot of discussion goes around with regard to double taxation of composite transaction to the extent supplies are made after the appointed date on which VAT and Service Tax has already been remitted under the erstwhile law. To tackle the same, Form TRAN 1 has come out with a table for section 142(11)(c), where VAT and Service Tax paid under the erstwhile laws are allowed to be carried forward as credit to the extent ‘supply’ is made after the appointed date on such composite transactions.

